

No. 14462

In the
United States Court of Appeals
For the Ninth Circuit

WORCESTER FELT PAD CORPO-
RATION,

Appellant,

vs.

TUCSON AIRPORT AUTHORITY,

Appellee.

Appellee's Answering Brief

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PAUL P. O'BRIEN
CL

BOYLE, BILBY, THOMPSON & SHOENHAIR,
JAMES P. BOYLE,
B. G. THOMPSON,
RICHARD B. EVANS,
907-916 Valley National Building
Tucson, Arizona
Attorneys for Appellee.

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Appellee's Answering Brief

FOREWORD

Examination of the Brief for Appellant discloses a failure by Appellant to comply with the rules of this Court.

Rule 18-2(b) of the Rules of Practice of this Court requires a statement of the pleadings and facts disclosing the basis for the District Court jurisdiction and for the jurisdiction of this Court. Such statement must refer distinctly to the statutory provisions believed to sustain the jurisdiction. Appellant has failed to state any statutory provisions sustaining the claimed jurisdiction of either the District Court or of this Court.

Rule 18-2(d) requires that in all cases a specification of errors relied upon by Appellant shall set out separately and particularly each error to be urged. Under the heading "SPECIFICATION OF POINTS AND ERRORS OF THIS APPEAL" appearing at Page 4 of the Brief for Appellant there are no claimed errors of the District Court set forth by Appellant.

STATEMENT OF THE CASE

Throughout Appellant's statement of the case under the heading "The Action" at Pages 2 and 3 of the Brief for Appellant, it refers to false representations and fraud. Such statements are mere conclusions of counsel which are not justified by the record in the case. There was no proof of false representations or of fraud on the part of Appellee.

Appellant states at Page 1 of the Brief for Appellant that its appeal is from the judgment of the District Court of December 9, 1953, and from the order denying plaintiff's motion for a new trial. Appellant's notice of appeal does not include an appeal from the denial by the District Court of Appellant's motion for a new trial. (T. 32).

Appellant omitted from its statement many facts concerning Appellant's business organization which Appellee feels should be stated for the benefit of this Court.

Appellant is a Massachusetts corporation engaged in the manufacture of household items used in kitchens

and laundries. It operated from a plant in or near Worcester, Massachusetts, in which it had carried on its manufacturing business for nearly 25 years. (T. 156, 157). The president and treasurer of Appellant was Mr. Julius Brauer.

Some three years prior to January 15, 1952, Appellant had determined to come to Tucson, Arizona, for the purpose of opening a plant to serve its western customers. (T. 208).

Appellant commenced negotiations for a lease with Appellee in January or February, 1949. (T. 220).

On March 1, 1949, Appellant and Appellee entered into the lease in question and Appellant took possession of the premises covered by the lease right after the lease was signed. (T. 158).

In March, 1949, Mr. Robert Alpert was sent from Chicago, Illinois, to Tucson, Arizona, by Appellant. From the time of his arrival in Tucson until he left Tucson in December, 1951, he was employed as manager of the Tucson operation of the Appellant. (T. 178, 200).

A bank account was opened by Appellant in the Valley National Bank of Phoenix in Tucson, Arizona, on March 14, 1949. This account remained open and active until it was closed February 19, 1952. (Defendant's Exhibits E and F, T. 247, 248).

Some time in the latter part of March, 1949, Appellant started receiving machinery in Tucson to be used

by it in its Tucson manufacturing operations. At about the same time Appellant commenced employing persons to assist in the installation of such machinery. (T. 206, 207). After the machinery was installed Appellant commenced manufacturing and selling the same type products which it had manufactured at its principal plant in Worcester, Massachusetts. It continued such operations until December, 1951. (T. 159, 160).

On September 26, 1951, Lt. Col. James L. Pattilo, Air Force Officer in Charge, Air Force Plant Office, Grand Central Aircraft Company, Glendale Division, Western Procurement District, addressed a letter to Appellee in which he requested that all undercover space on Tucson Municipal Airport occupied by the Air Force and Consolidated Vultee during World War II be made available immediately for rental or lease by Grand Central Aircraft Company. (Plaintiff's Exhibit 5, T. 76-78).

On October 4, 1951, the manager of Appellee responded to Lt. Col. Pattilo's request stating that he would present the request of the Air Force to Appellee's Board of Directors. (Plaintiff's Exhibit 8, T. 87-90). On October 10, 1951, Lt. Col. Pattilo acknowledged receipt of Mr. Schmidt's letter of October 4, 1951, and requested Mr. Schmidt to advise him of the Appellee's Board of Directors' decision. (Plaintiff's Exhibit 9, T. 94). On October 6, 1951, Mr. Schmidt transmitted a copy of plaintiff's Exhibit 5 to Mr. H. A. Hook, Civil Aeronautics Administration, asking for the C.A.A.'s opinion as to the effect of the request

of the Air Force. (Defendant's Exhibit H, T. 259, 260). On October 9, 1951, Mr. H. Brown of the Civil Aeronautics Administration advised Mr. Schmidt that the request of the Air Force was within the authority reserved to the Government in the agreement by which the United States Government deeded the airport property to the City of Tucson. (Defendant's Exhibit G, T. 257-259).

After receiving the letter from Mr. Brown of October 9, 1951, on October 18, 1951, Mr. Schmidt addressed a letter to Mr. Brauer, as president of Appellant, advising him the Federal Government required the use of space at the airport which was then occupied by Appellant and notifying Appellant of the termination of the lease, and notifying Appellant to vacate the premises occupied by it by November 30, 1951. (Plaintiff's Exhibit 2, T. 80-82).

Thereafter Appellant asked for and was granted by Appellee an additional period of time to remove its property from space occupied by it at the Tucson Municipal Airport. On or about December 15 or 16, 1951, Appellant voluntarily vacated the premises previously occupied by it at Tucson Municipal Airport. (T. 159).

Appellant at no time complied with the statutory provisions of the State of Arizona required of a foreign corporation before it may enter upon, do or transact any business within the State of Arizona. (Defendant's Exhibit D, T. 192, 193).

Appellant, on page 4 of its brief, concludes its statement of the case in these words:

“The question presented on this appeal:

Is a suit on a lease, valid when made, rendered void by the subsequent doing of business by the lessee?”

This precise question is not raised by the record. There are more than one question to be considered in this appeal. Every question raised by Appellee's motion for a directed verdict is to be considered upon this appeal.

Appellee submits that the questions presented by this appeal are:

(1) Can a Massachusetts corporation enter into a valid lease in Arizona prior to the time it qualifies as a foreign corporation under the statutes of the State of Arizona, when the undisputed evidence is that for some time prior to the execution of the lease it had planned to enter upon its business in Arizona, had negotiated for the leasing of premises in Arizona for the conduct of a portion of its regular business in Arizona, and when immediately following the execution of a lease it actually commences to manufacture and sell in and from the leased premises in Arizona the same type of products it had been manufacturing and selling in and from its principal place of business in Massachusetts? and

(2) Was there any evidence in support of the material allegations of its complaint which entitled Appellant to go to the jury upon any of the issues raised

by its complaint, Appellee's answer as amended, and the evidence?

Appellee's answer to each of these question is *No*.

ARGUMENT

1. **Can a Massachusetts Corporation Enter Into a Valid Lease in Arizona Prior to the Time it Qualifies as a Foreign Corporation Under the Statutes of the State of Arizona, When the Undisputed Evidence is that for Some Time Prior to the Execution of the Lease it Had Planned to Enter Upon Its Business in Arizona, Had Negotiated for the Leasing of Premises in Arizona for the Conduct of a Portion of Its Regular Business in Arizona, and When Immediately Following the Execution of a Lease it Actually Commences to Manufacture and Sell In and From the Leased Premises in Arizona the Same Type of Products it Had Been Manufacturing and Selling In and From Its Principal Place of Business in Massachusetts?**

Each State possesses broad power to control the activities of foreign corporations within its borders. A State may, in granting to a foreign corporation the privilege to do business within its borders, impose such conditions, restrictions, and regulations as it may see fit, and the mere fact that they are unreasonable or discriminatory does not destroy their validity. See: 23 Am. Jur. 207, Sec. 238, Foreign Corporations, American Law Institute, Restatement, Conflict of Laws,

Sec. 169, and *Crescent Cotton Oil Co. vs. Mississippi*, 257 U. S. 129, 66 L. Ed. 166, 42 S. Ct. 42.

Arizona has exercised this power granted to it and the statutory pronouncements of it are found in Secs. 53-801 A.C.A. 1939 Ed., 1952 Cum. Supp., and 53-801 A.C.A. 1939 Ed., both of which are quoted in full in the Brief for Appellant at page 5 thereof. Appellee will not requote the statutes in its brief.

In an action brought by a foreign corporation which has not qualified to do business within the State in which the Federal Court sits, the Federal Court is governed by the provisions of the State statutes as construed by the Courts of the State. See: *Metropolitan Life Ins. Co. vs. Kane*, 117 Fed. (2d) 398, and *Erie R. Co. vs. Thompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.

If the lease upon which Appellant is suing was made in violation of the laws of the State of Arizona, it can not be enforced in any court sitting in this State charged with the interpretation and enforcement of its laws. See: *Cooper Manufacturing Co. vs. Ferguson*, 113 U. S. 1137.

The Arizona Statute prescribing the conditions upon which a foreign corporation may be licensed to do business within the State of Arizona requires any foreign corporation, before *entering upon*, doing, or transacting any business, *enterprise* or occupation in this State, to do certain enumerated things. Research by counsel for Appellee indicates that no other State

has included in its statute governing foreign corporations the words "entering upon."

We assume that it is beyond argument that appellant as of the date of the execution of the lease involved in this appeal had not complied with the provisions of Sec. 53-801 A.C.A., 1939 Ed., 1952 Cum. Supp. Likewise it must be conceded that appellant did not comply with the provisions of that statute at any time subsequent to the execution of the lease.

By implication the Arizona Supreme Court in *Woodward vs. Fox West Coast Theaters*, 36 Ariz. 251, 284 P. 350, stated that a lease executed by a foreign corporation which had not qualified itself to do business within the State prior to the execution of the lease would be void and unenforceable.

In that case the Arizona Supreme Court had before it a case in which the Fox West Coast Theaters, a foreign corporation, had leased property in Phoenix, Arizona. Fox West Coast Theaters was a California corporation, and during the negotiations for the lease it had not qualified to do business in Arizona. Prior to the execution of the lease, however, it had complied with the statutory provisions of the State and had been licensed to do business within the State. The Supreme Court of Arizona said:

"We do not think that, because plaintiff was not qualified and licensed during the negotiations leading up to the lease, it would affect the validity of the lease. *It was qualified when the lease was*

executed. That appears to be sufficient." (Emphasis supplied.)

The inference to be deduced from its decision is that the Arizona Supreme Court determined the lease to be valid and enforceable because of compliance by Fox West Coast Theaters with the requirements of the Arizona statutes *prior to the actual execution of the lease*. The inference cannot be escaped that had such a compliance not been shown the lease would have been held void and unenforceable.

In the case of *National Union Indemnity Company vs. Bruce Bros., Inc.*, 44 Ariz. 454, 38 Pac. (2d) 648, plaintiff, Bruce Bros., Inc., was a Nevada corporation which had entered into a contract with the State of Arizona for the construction of a highway. Plaintiff and defendant, Scott, entered into a subcontract by which Scott was to furnish gravel to plaintiff for use in the construction of the highway. Scott furnished plaintiff with a performance bond upon which defendant, National Union Indemnity Company, was surety. Scott defaulted in the performance of his contract with Bruce Bros., Inc. Bruce Bros., Inc., took over, finished the job and then sued Scott and his surety for damages. The Arizona Supreme Court held, that because of its failure to qualify to do business within the State of Arizona, Bruce Bros., Inc., could not recover on its contract with Scott or on Scott's bond.

The Arizona court pointed out that the principal business of Bruce Bros., Inc., was the constructing of

highways wherever it could obtain a contract to do so. It had obtained a contract of considerable magnitude for the construction of a highway within the State of Arizona. It had moved a large amount of equipment into the State, maintained an office for the transaction of its business in the State, and its operations, in connection with the performance of its contract, involved dozens of separate transactions and many thousands of dollars, all of which were done through its office in Arizona.

The Court said:

“If this be not the transaction of business within the State, we are unable to see where anything done by that kind of a corporation would be such. . . . We hold, therefore, that plaintiff was, within the meaning of Section 658, *Supra*, transacting business within the requirements of Section 657, *Supra*. If nothing further appears, plaintiff may not maintain this action, for by the express language of the Statute, its contract is void.”

The Supreme Court of Arizona also pointed out that under a statute like Arizona's there is no room for construction in that the Arizona legislature has repeatedly and solemnly declared that *any and all the acts* of a foreign corporation which has not qualified to do business in Arizona, are void without qualification or exception of any nature. The Court said in this regard:

“Under such circumstances, no action that anyone could take could give the contract validity.”

Applying the Bruce Bros., Inc., case to the factual situation in the present case we find quite an analogous situation. Appellant is a Massachusetts corporation which was engaged in the business of manufacturing, selling and distributing household items such as ironing board covers, ironing board pads, laundry bags and other items that are used in the kitchen or laundry of a home, and which, prior to March 1, 1949, was conducting all of its operations from its home plant at Worcester, Massachusetts.

Prior to March 1, 1949, it was selling and distributing its manufactured products throughout the western part of the United States. Prior to January 15, 1949, it determined to open a plant in Tucson, Arizona, and along in January or February of 1949, its president commenced negotiating for a lease on certain property controlled by Tucson Airport Authority. On March 1, 1949, it entered into a lease with Appellee, and within a short time it had opened a bank account in Tucson, was installing equipment, procuring personnel, and manufacturing the same type of products in its rented facilities in Tucson, as it had been manufacturing in Massachusetts. Thereafter, at Tucson, it continued to perform the same type of manufacturing, selling and distributing of the same type of items as were manufactured, sold and distributed from its Massachusetts plant. It doing so it had employees here, was purchasing and receiving materials here, was banking here, and was shipping its finished products from its Tucson plant to customers in Arizona and throughout the western part of the United States.

The conclusion is inescapable that the actions of the Appellant at its plant in Tucson were the same type as those described by the Arizona Supreme Court in the *Bruce Bros., Inc.* case, *supra*, and in the words of the Supreme Court as published in that case "if this be not the transaction of business within the State, we are unable to see where anything done by this kind of a foreign corporation would be such."

Appellant's theory would seem to be that since the Arizona Supreme Court has on some occasions indicated that a "single, isolated act" would not constitute a doing of business so as to require a foreign corporation to comply with the statutes of the State, its act of entering into a lease on March 1, 1949, was a "single, isolated act" which did not constitute doing business within the State, and that therefore the statutory pronouncement that such act is "Void" does not apply. It may be said that if Appellant did nothing further after entering into the lease, a different question would be presented. However, an examination of the cases cited by Appellant in its Opening Brief indicates that while the Supreme Court of Arizona did start out by referring to "single, isolated acts" as not constituting the "doing of business" in Arizona, as time progressed and as modification of the Act included the words "entering upon", it started to consider in its decisions the doing of an act with the intention of entering upon or engaging in an enterprise of some permanence and durability, as opposed to a single act.

In this case the record is crystal clear that the execution of the lease by Appellant with Appellee was the entering upon an enterprise in the State with the idea of operating a business of considerable permanence and durability. It might have been the first act done by the Appellant within the State of Arizona, but certainly it does not fall into the category of a "single, isolated act."

All prior Arizona cases involving a construction and application of the statutory provisions involved in this case were reviewed by the Arizona Supreme Court in the case of *National Union Indemnity Company vs. Bruce Bros., Inc., Supra*. In summing up, the Court said,

"It will be seen from these cases that we have held an isolated act of business done or contract entered into in Arizona does not bring the foreign corporation within the statute, and that to come within it 'a corporation must be engaged in an enterprise of some permanence and durability, and must transact within the State some substantial part of its ordinary business, and not merely a single act.' "

In these prior Arizona cases the isolation of the acts or contracts under consideration was apparent, showing no intention of permanence and durability in doing business in Arizona. The actors in most of these cases didn't have places of business, they were not trying to establish places of business, they didn't pursue or prosecute any business in Arizona.

In the *Bruce Bros.* case, however, the plaintiff established an office for the transaction of business, brought road equipment into the State and pursued its business in the State. Bruce Bros., Inc., couldn't recover. Its very first act showed that it intended to do business in the State. A single act is not always an isolated act. When it is accompanied by an intention to do business in the State and followed by the doing of business in the State, the foreign corporation must be legally qualified and licensed. The contract Bruce Bros., Inc. made with Scott was not an isolated act. It was accompanied by an intention to do business in Arizona. Bruce Bros., therefore, could not recover on the contract because, not being qualified or licensed, the contract was void.

This case, as has been shown above, is on all fours with the case of Bruce Bros., Inc. It is not contended that a foreign corporation intending to do business in Arizona may not survey the situation, gather information, look for a place of business, enter into negotiations for a lease, as Fox Coast Theaters did, but when it decides to do business in the State, then any act following these preliminary negotiations, such as securing a place for the transaction of its business, is absolutely void if, prior to the commission of the act, it had not qualified itself to do business. The Fox West Coast Theatres lease was held to be valid because following negotiations and before executing the lease, it did qualify itself to do business in Arizona. When a foreign corporation makes up its mind to do business

in Arizona it must qualify itself before it begins to transact any business.

An act "accompanied by an intention to perform a series of further acts in the State in the prosecution of its business constitutes the doing or carrying on of business in the State, although no other act or transaction has yet been done or entered into." (Am. Jur., Vol. 23, p. 355).

There is no doubt about the provisions of Sec. 53-802 A.C.A. 1939 Ed. It solemnly declares that "*every act*" done by a foreign corporation prior to complying with Sec. 53-801 A.C.A., 1939 Ed., 1952 Cum. Supp. "*shall be void.*" It does not say that the first act done shall be valid and that all subsequent acts shall be void, as Appellant would lead the Court to believe. The statute is clear and unequivocal, it has been interpreted by the Arizona Supreme Court, and the only conclusion that can be drawn from the Statutes and from the decisions of the Court is that the lease made by Appellant with Appellee on March 1, 1949, as held by the Trial Court, is void and unenforceable.

2. Was There Any Evidence in Support of the Material Allegations of Its Complaint Which Entitled Appellant to Go to the Jury Upon Any of the Issues Raised by Its Complaint, Appellee's Answer as Amended, and the Evidence?

At the conclusion of all of the evidence upon the trial of this case, both parties having rested, Appellee moved for an instructed verdict in its favor. The mo-

tion appears at pages 261, 262 of the Transcript of Record. The motion was based upon the following:

(1) That Appellant had not proven fraud on the part of Appellee;

(2) That Appellant had not proved that it had been wrongfully evicted from its leased premises by Appellee; and

(3) That Appellant was a foreign corporation which had not qualified to do business in Arizona as of the date of the execution of the lease involved in the case.

Appellee has previously discussed the third part of its motion for an instructed verdict, and as indicated believes the Trial Court was correct in granting the motion upon that ground. The other two grounds for an instructed verdict which were specifically presented to the Court were not mentioned by the Court in directing the verdict but they are good and sufficient grounds in support of the Court's order and Appellee therefore is entitled to urge them before this Court in further support of the order.

“. . . grounds of a motion for a directed verdict which were presented to the trial court may properly be urged in an appellate court in support of a propriety of such direction even though the lower court did not pass upon them.”

Mosby vs. Manhattan Oil Co., 52 Fed. 2d 364,
77 A.L.R. 1099.

The gist of Appellant's complaint (T. 9-13) was:

(1) That Appellee falsely represented to Appellant that the Federal Government required Appellant's leased premises; and

(2) That Appellee wrongfully evicted Appellant from its leased premises.

Actions based on fraud have had their fair share of attention by the Arizona Supreme Court and its decisions have clearly defined the law applicable thereto in the State of Arizona. These decisions are, of course, controlling upon the question in this case.

“Fraud is generally classified under two major headings, actual and constructive. The former is distinguished by the presence of an actual intent to deceive, while the latter is characterized by a breach of duty actionable at law irrespective of moral guilt, and arising out of a fiduciary or confidential relationship.”

In re McDonnell's Estate, 65 Ariz. 248, 179 P. 2d 238.

There is no fiduciary or confidential relationship existing between lessor and lessee. See: *Meachem vs. Halley*, 103 Fed. 2d 967.

The elements of actionable fraud have been defined by the Arizona Supreme Court in *Rice vs. Tissaw*, 57 Ariz. 230, 112 P. 2d 866, as follows:

- “1. A representation;
2. Its falsity;

3. Its materiality ;
4. The speaker's knowledge of its falsity or ignorance of its truth ;
5. His intent that it should be acted upon by the person and in the manner reasonably contemplated ;
6. The hearer's ignorance of its falsity ;
7. His reliance on its truth ;
8. His right to rely thereon ;
9. His consequent and proximate injury."

The evidence in this case was that Appellee represented to Appellant that the Federal Government required the use of the space occupied by Appellant. It was never shown that such a representation was false. In fact, the only evidence in the case on the point was that the request as made by Col. Pattillo was referred by Appellee's general manager to the C.A.A. for determination as to its validity, and that the C.A.A. advised Appellee that the request was a proper one under the reservations of the Government in the deed conveying the airport property to the City of Tucson.

There was no evidence that Appellee had knowledge of the falsity of any representations made by it, or that it made any representations in ignorance of their truth. The contrary was shown to be the fact—Appellee believed to be true any representation made by it, was advised by C.A.A. that it was true, and passed it on to Appellant as being true.

There was nothing in the record to show that Appellant had the right to rely upon any representations

made by Appellee's manager. The record is clear that Appellant accepted whatever representations were made to it by Appellee and at no time made any attempt to inquire of the Government or any of its representatives as to the truth or falsity of the matters stated in Appellee's letter to Appellant.

"Where parties deal at arm's length and are on equal terms, one who has failed to avail himself of knowledge readily within his reach can not claim the right to rely upon representations which he could have discovered to be false by the use of such knowledge."

Law vs. Sidney, 47 Ariz. 1, 53 P. 2d 64.

In summary, the Appellant did not prove: that any representation made by Appellee was false; that Appellee knew that any representations of any type made by it were false; or that Appellant had the right to rely upon any representations made by Appellee. For this reason, Appellant failed to prove the material allegations of its complaint, and the directed verdict is supported by the first ground presented by Appellee's motion therefor.

There can be no question but that Appellant voluntarily surrendered possession of the premises occupied by it to Appellee along in December 1951. There was no forcible eviction of Appellant from its premises by Appellee, and likewise there was no evidence of any harrassing actions or threats of violence made against Appellant by Appellee.

When a tenant voluntarily surrenders possession of the leased premises it can not thereafter contend that it has been wrongfully evicted.

In *Coury v. Porterfield*, 299 S.W. 938, a lease provided for termination of the lease if oil should be found in the county and the landlord gave notice of termination stating that oil had been found. This was untrue, but the tenant moved out anyway. The Court held that there had been no wrongful eviction for the reason that the demand of the lessor did not deprive the tenant of the beneficial enjoyment of the leased premises.

In *Gibson v. Thisius*, 134 P. 2d 713, the Court said:

“It has been broadly stated in some cases that mere notice to quit, followed by vacation of the premises by the tenant, is sufficient to constitute a constructive eviction, or, at least to make an issue of fact for the jury. We think, however, it will be found in all such cases harrassing incidents disturbing to the tenant’s peaceful possession occurred on the property. . . . To constitute constructive eviction there must be some substantial interference which is injurious to the tenant’s beneficial use and enjoyment of the premises.”

While the Appellant alleges a wrongful termination of its lease, it failed to prove a wrongful eviction. The vacating of the premises by Appellant was a purely voluntary act on its part and as such does not support a claim for wrongful termination of its lease or for wrongful eviction. There was no substantial interference with Appellant’s beneficial use and enjoyment of

the premises. For this reason, the second ground urged by Appellee in its motion for an instructed verdict was well taken, and supports the ruling of the Court on that motion.

CONCLUSION

The Court's order granting Appellee's motion for directed verdict may be sustained on any one of the following three grounds:

(1) That Appellant at no time prior to or subsequent to the execution of its lease with Appellee on March 1, 1949 complied with the statutes of the State of Arizona governing the entry upon or doing of a new enterprise of business by a foreign corporation.

(2) The Appellant completely failed to present any competent evidence from which reasonable persons could find that the Appellee at any time made a material false representation, knowing of its falsity, with the intention that the Appellant rely upon it, and which representation Appellant did rely upon, having the right to rely thereon and thereby suffered damage.

(3) Appellant failed to present any competent evidence from which reasonable persons could find that Appellee had wrongfully terminated Appellant's lease and wrongfully evicted Appellant from its leased premises.

Because of all of the foregoing matters, the ruling of the Trial Court should be affirmed.

Respectfully submitted,

BOYLE, BILBY, THOMPSON
& SHOENHAIR

James P. Boyle

B. G. Thompson

Richard B. Evans

By Richard B. Evans

Attorneys for Appellee

907-916 Valley National Bldg.

Tucson, Arizona

